Some Thoughts on Issues Facing West Virginia Lawyers

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Introduction

The topic of this panel, issues facing the bar, or, more particularly, West Virginia lawyers, invokes a broad range of issues. Are we a profession or just another service vender? Are we fighting hard enough to preserve the attorney client privilege and work product doctrines? Where do we rank in relation to used car sales in public perception of our integrity and why? Are talking animals an appropriate way to advertise our services? Are we doing enough pro bono? Are we serving our communities and how? Are there better ways to select our judges? Should we have an intermediate appellate court? A bigger Supreme Court? Appellate review of all cases? Can our system be improved by better disclosure and recusal standards? Are we tort hell or heaven or something in between? Can we lawyers even agree on what issues we face, much less how to solve or resolve them?

Here are a few pages of things I am thinking about which don't even cover all these issues. I can't speak for anyone else, and my views are all mine, and not the Defense Trial Counsel, my firm's clients, or Jackson Kelly, for that matter. These are subjects, in my view, for serious and collegial discussion and consideration.

On Judicial Selection

Increasingly turbulent elections, particularly of our Supreme Court judges, compel the question of whether partisan election is the best way to select judges. While no system is perfect, it is legitimate to ask the question, and examine whether some system of merit selection or appointment, perhaps coupled, a la Missouri, with a retention election, is the better path.

A 2004 survey of West Virginia lawyers by the State Bar showed that 66.7% answered "yes" to the question "do you think the present system of judicial selection should be changed?" Thirty one percent stated they would support non partisan elections, 23% nomination by governor with legislative confirmation, 19% appointment with

retention election, and 5.6% appointment by governor.[1] A 1994 survey showed 57% in favor of change, and 36% against, and a 1999 survey showed 59 in favor of change and 40% against. The largest number of votes in both the 1994 and 99 surveys favored merit selection with 72% in 1994, and 70% in 1999.

The West Virginia legislature has periodically shown interest in the selection of judges. In 1998, a constitutional amendment was proposed in the West Virginia House of Delegates, which provided for the selection of judges "nominated by a judicial nominating commission on the basis of merit and appointed by the governor," and the formation of an intermediate appellate court.[2] Another amendment was proposed in 2000.[3] More recently, in 2008, Senate Concurrent Resolution 69 states:

> Whereas, Judges in West Virginia are selected by partisan political elections; and
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> Whereas, In recent years, significant sums have been spent by sources located both within and without West Virginia to influence the elections of judges; and
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> Whereas, The influx of campaign money in judicial races damages the concept of an independent judiciary and gives rise to the perception that justice is for sale, undermining public confidence not only in the judiciary, but also in all of state government; and
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> Whereas, It is imperative that the public perception of the integrity of judicial decisions and of the judiciary in general be restored; and
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> Whereas, Other states provide for the selection of judges by various methods, including partisan election of judges, non- partisan election of judges, appointment by the Executive, appointment by the Executive with the approval of the Legislature appointment by a judicial selection panel; and
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> Whereas, At least one state has enacted provisions for public funding of judicial elections and other states are considering similar measures; and
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> Whereas, Each method of judicial selection has its advantages and disadvantages; therefore, be it
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> Resolved by the Legislature of West Virginia:
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> That the Joint Committee on Government and Finance is hereby requested to study judicial selection methods and public financing of judicial elections; and, be it
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> Further Resolved, That the Joint Committee on Government and Finance report to the regular session of the Legislature, 2009, on its

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[1] The 2004 survey results can be found at www.wvbar.org/barinfo/04msurveyresults.html. By way of disclosure, I served on the Board of Governors of the West Virginia State Bar as a representative of District 8, Kanawha County, from 2002-2005.

[2] House Joint Resolution 21, available online at www.legis.state.wv.us/Bill_Text_HTML/1998_SESSIONS/RS/Bills/HJR21%20INTR.htm).

[3] Senate Joint Resolution No. 9, www.legis.state.wv.us/Bill_Text_HTML/2000_SESSIONS/RS/Bills/sjr9%20org.htm.

findings, conclusions and recommendations, together with drafts of any legislation necessary to effectuate its recommendations; and, be it

Further Resolved, That the expenses necessary to conduct this study, to prepare a report and to draft necessary legislation be paid from legislative appropriations to the Joint Committee on Government and Finance.[4]

In July 2003, the American Bar Association Commission on the 21st Century Judiciary issued a report entitled "Justice In Jeopardy," stating:

> In short, ours is a great judiciary, and our goal is to make certain that it remains so. In that spirit, we must report that all is not well. Although our judicial systems have served us long and admirably, they are systems in serious jeopardy. They are being jeopardized by the corrosive effect of money on judicial election campaigns, in which some lawyers, businesses, and others interested in the outcomes of cases seek to gain advantage in the courtroom by influencing at the ballot box who will be judges. These infusions of campaign dollars have often been spent on attack advertising calculated to persuade a majority of the electorate that incumbent judges should be removed from office because they have made unpopular rulings in isolated cases or are beholden to their own campaign contributors. Not all states have experienced such problems, but the number that have is growing rapidly.
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> Such developments threaten to poison public trust and confidence in the courts by fostering a series of perceived improprieties: that judges are less than independent and impartial, that justice is for sale, and that justice is available only to the wealthy and powerful or to political and racial majorities. Within communities of color—that together will comprise a majority of the American people by the middle of this century—suspicion of the courts is compounded by a lack of diversity throughout the justice system. And these increasingly jaded views of the judiciary have begun to filter their way into the halls of state legislatures, where general assemblies often take a combative posture toward the judiciary when appropriating monies to fund court budgets and salaries.
>
> The time has come to inoculate America's courts against the toxic effects of money, partisanship, and narrow interests.

ABA Report, at 1. The ABA report concluded:

> **The preferred system of state court judicial selection is a commission-based appointive system, with the following components**:

[4] www.legis.state.wv.us/Bill_Text_HTML/2008_SESSIONS/RS/BILLS/scr69%20org.htm.

> · The governor should appoint judges from a pool of judicial aspirants whose qualifications have been reviewed and approved by a credible, neutral, nonpartisan, diverse deliberative body or commission.
>
> · Judicial appointees should serve until a specified age. Judges so appointed should not be subject to reselection processes, and should be entitled to retirement benefits upon completion of judicial service.
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> · Judges should not otherwise be subject to reselection, nonetheless remain subject to regular judicial performance evaluations and disciplinary processes that include removal for misconduct.

Report, at v-vi.[5]

The ABA report is a worthwhile read on this topic as it discusses the increased politicization of judicial races, including increased participation by single issue groups and business interests, use of "hot button" issues (criminal and tort reform cases), the spiraling cost of judicial elections, the perception that judges are beholden to their contributors, and the uncertainty about limits of speech in judicial elections after *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). ABA Report at 13-28. An overall concern about elections is "the message sent to the electorate is the same in each case; sitting judges should lose their jobs if they make a ruling of law in a particular case that a popular majority thinks is wrong. In the Commission's view, that message is antithetical to principles of judicial independence, impartiality, and the rule of law." ABA Report at 99. Recognizing that no system is perfect, the ABA recommends a series of recommendations based on merit selection, limited terms and education of judges.

The Brennan Center, a liberal watchdog on a variety of legal issues, supports merit selection of judges over partisan political battles. The Center is most critical of the increased use of television, funding by business interests and aggressive, often single issue campaigns, by both judges and independent groups. "When it comes to fundraising, available data show that systems of merit selection of judges, coupled with retention elections, result in dramatically less expensive campaigns than nonpartisan or partisan contested elections….Concerned about efforts like these [to dismantle merit/retention systems] to give interest group and political partisans more leverage over the courts, organizations who care about fair courts have organized to respond. They've been building coalitions and educating Americans about these efforts, the motivations behind them, and how merit/retention systems are one way to insulate courts from the growing amounts of special interest money being routinely poured into judicial elections across America." James Sample, Lauren Jones & Rachel Weiss, The New Politics of Judicial Elections 2006 (Brennan Center), at 41.

West Virginia has had a number of organizations weigh in on the issue of judicial selection. Despite the surveys mentioned above which supported a change from partisan

[5] The report can be downloaded at www.abanet.org/judind/jeopardy/pdf/report.pdf.

election to merit selection, and vigorous debate, nothing has changed, and West Virginia still elects judges, in what are increasingly bruising election battles.[6]

The Supreme Court of Appeals created a Commission on the Future of the Judiciary, which, in part, critically evaluated judges are selected in West Virginia. By order entered October 2, 1997, the Court ordered the Chief Justice to establish a commission to:

> (1) Examine the trends, both internal and external to the court system, which are affecting the role of the court as an institution and the delivery of its services;
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> (2) Assess the performance of the court system in light of established standards of fairness, accessibility, timeliness, and accountability;
>
> (3) Identify the strengths upon which to build as well as the obstacles to overcome to enable the court system to improve its performance;
>
> (4) Make recommendations as to structural, organizational, and procedural changes that will ensure a just, effective, responsive, and efficient court system into the next century; and
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> (5) Develop a general plan to implement the recommendations; and
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> IT IS FURTHER ORDERED that in this endeavor the Commission consider the experiences and perspectives not only of the judicial officers and others who work within the system, but also those individuals, organizations, and agencies that are served by the court system; and
>
> IT IS FURTHER ORDERED that the Commission submit its deliberations and recommendations to the Supreme Court of Appeals in the form of a final report by December 1, 1998.

The Commission[7] issued a final report which addressed a wide range of issues, with subcommittees which addressed four general topics: Access to Justice[8], Expedition

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[6] See, James Sample, Lauren Jones & Rachel Weiss, New Politics of Judicial Elections 2004 (Brennan Center), at 4 (discussing the 2004 election between Justice Warren McGraw and Brent Benjamin). The television war, however, started in the Democratic primary between incumbent McGraw and challenger James Rowe. "In a hotly contested Democratic primary campaign, Justice McGraw and challenger Judge Jim Rowe, and their allied interest groups, aired 1,608 TV spots at a combined cost of $677,922. The assault on the airwaves began on March 15." Brennan 2004 at 5.

[7] The Commission, chaired by David Hardesty, President of West Virginia University, included the presidents of each of the voluntary bar associations: Defense Trial Counsel of West Virginia (Michael Bonasso), the Mountain State Bar (Cheryl Henderson), West Virginia Trial Lawyers (Laura Rose), and the State Bar (D.C. Offutt). www.state.wv.us/wvsca/future/report/member1.pdf. The Supreme Court website links to the Commission's report. www.state.wv.us/wvsca/projects2.htm.

[8] www.state.wv.us/wvsca/future/report/rep1.pdf.

and Timeliness[9], Equality, Fairness & Integrity[10], and Independence and Accountability.[11]

The subcommittee on Independence and Accountability issued a report which addressed "Appropriateness of the Judicial Election Process and Consideration of Merit Selection." The report recognized the different means of judicial selection partisan election of judges, compared to non partisan judicial elections, merit selection by nominating committee, or directly by the governor or legislature, or a combination of merit selection and election (the Missouri plan).[12] The Commission recognized stated a concern about partisan elections:

> Concerns raised about this method of judicial selection include impartiality problems (real or perceived) arising from the political process when judicial candidates must campaign for a position for which they are ultimately expected to remain impartial. Much of this concern arises from the practice of financing these campaigns through contributions that often come from lawyers and litigants.

Reflecting a split of opinion, the subcommittee report contained a Majority and Minority position. The majority opinion recommended partisan political election of judges:

> A political process is invariably involved in whatever method is chosen for the selection of circuit court judges, whether it be by nominating commission and subsequent appointment or by popular election at the polls. Although each system of judicial selection has its own positive and negative attributes, the current method of selecting judges by the vote of the electorate should remain as the principal method in this State unless and until another selection method is proven superior.
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> A system of merit selection is currently used on a voluntary basis under Executive Order of the Governor for the selection of judges to fill midterm vacancies. That process utilizes a nominating commission and subsequent appointment by the Governor. This method appears workable and beneficial, and should continue in all vacancies occurring at the Supreme Court level as well as the Circuit Court level.

The majority concluded: "The State of West Virginia should continue to use the popular partisan election system for the selection of Supreme Court justices, circuit court

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[9] www.state.wv.us/wvsca/future/report/rep2.pdf.

[10] www.state.wv.us/wvsca/future/report/rep3.pdf. This subcommittee was chaired by Elaine Harris. As a matter of disclosure, Julia Hurney, who was the subcommittee staff attorney, is my wife. www.state.wv.us/wvsca/future/report/acknow.pdf.

[11] www.state.wv.us/wvsca/future/report/rep4.pdf.

[12] The report states that West Virginia, at the time, was one of eight states with partisan election of judges. Report, at 58.

judges and magistrates." It further recommended that the legislature codify the system of appointing judges to fill vacancies.

The Minority report favored merit selection for appointing judges, stating:

> Although no method can completely eliminate politics, a merit selection/retention system does spare candidates from the potentially compromising process of raising money and campaigning. This system gives the public a better-informed voice through participation on nominating commissions and voting in retention elections. A substantial majority of the states in this country use a system of merit selection for choosing some or all members of the judiciary. In fact, in this State, governors over the past decade have utilized a nominating commission to select qualified appointees to fill midterm vacancies on the trial court bench. While no system of judicial selection is perfect, the merit selection and retention election method is best-suited to balancing the central principles of judicial independence and judicial accountability.

Accordingly, the Minority report recommended a Missouri type plan of appointment and retention election:

> The Legislature, by proposed constitutional amendment for voter approval, should establish a merit selection and retention election method for selection of all appellate and trial court judges in this State. The constitutional amendment should provide for one judicial nominating commission for the Supreme Court of Appeals (and any other intermediate appellate court later created); and one nominating commission for each judicial circuit. Appointment by the Governor to an initial term would be made from those qualified applicants selected by the nominating commission. The appointed judge would then be subject to retention election by majority vote for each subsequent term. If the voters chose not to retain a particular judge, the nomination and appointment process would begin over again.

On July 24, 2004, the State Bar Board of Governors (President Charles Love III) voted to appoint a judicial selection commission. A motion to table the matter was defeated, and a later motion was passed prohibiting the Commission from meeting before the 2004 judicial election.[13] The judicial selection committee reported at the May 5, 2005

[13] The Minutes of the Board of Governor's meeting on July 24, 2004, state:

> A motion was duly made and seconded to appoint the following individuals to serve on the Judicial Selection Commission - Immediate Past President John Bailey (chairperson), Vice President Rob Fisher, Kay Bayless, Nick Casey, David Cecil, Cheryl Connelly, Kitty Dooley, Dean John Fisher, Thomas Flaherty, William Harvit, Phil Hill, Steve Jory, Charles McElwee, Thomas Miller, William Parsons, II, Jay West and representatives from the four statewide bar organizations.

meeting: "Immediate Past President Bailey informed the Board that the Committee had met twice since the past Board Meeting. The group had now been divided into two specific Work Groups - one, chaired by John Cooper, that would consider what actions need to be taken if there was no change in the current judicial selection process and a second Work Group chaired by Dean Fisher, that would look at the various options available for merit selection of judicial candidates."[14] At a July 15-16, 2005, meeting, on recommendation of the Commission recommended, the Board voted to recommend to the governor the appointment of a Judicial Advisory Committee.[15]

At a meeting on Oct 7-8, 2005, the Board of Governors discussed the recommendations of the Judicial Selection Committee. The minutes reflect extensive discussions, and a minority report issued, but there are no details as to the recommendation of the Committee. The minutes merely state "a motion was duly made, seconded and approved to retain the current judicial election procedure…and to maintain the present partisan election system for appellate court positions." The Board also recommended that the Legislature adopt a public financing plan for Supreme and intermediate appellate court elections, and that a judicial voters' guide be provided to the media and all voters.[16]

Similar conclusions were reached by The Defense Trial Counsel of West Virginia in its Civil Justice Report, issued in August, 2003, and which stated with respect to the judiciary:

> 27. Partisan election of judges and their corresponding regard for various "constituencies" conveys the impression that their decision making, like that of Legislators, is too much driven by party allegiance or special interests, rather than the rule of law.

> Then, a motion was duly made and seconded to table the motion to set up the Judicial Selection Commission. The motion to table was defeated by a hand vote of 11-10.
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> Then, a motion was duly made and seconded to add a sitting Supreme Court Justice, a sitting Circuit Court Judge and a sitting Family Court Judge to the Judicial Selection Commission. The motion to amend the main motion was defeated.
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> Then, the vote was taken on the main motion to appoint a Judicial Selection Commission and it was approved by a hand vote of 12-11.
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> Finally, a motion was duly made, seconded and passed that there would be no meetings of the Judicial Selection Commission with just the distribution of appropriate documents and materials until after November 2, 2004.

www.wvbar.org/barinfo/members/bog%202004/2004%20July%2023.htm.

[14] www.wvbar.org/barinfo/members/bog%202005/2005May5.htm.
[15] www.wvbar.org/barinfo/members/bog%202005/2006jul15.pdf.
[16] www.wvbar.org/barinfo/members/bog%202005/oct05bog.pdf.

> 28. There is a general view among defense lawyers, business leaders and other organizations, that support and contributions to judicial election campaigns by lawyers and others actually affect and influence the outcome of cases. Just as important is the general view that lawyer contributions to judicial candidates taint the integrity of judicial systems generally.
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> 29. Certainly at times, the increased politicization of the Judiciary may have also inured to the benefit of particular defendants, defense attorneys or their causes, but that is not what the Civil Justice Committee advocates or believes is in the best interest of the civil justice system and the citizens of West Virginia.
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> 30. There is a general view that appointed judges, even those with less trial experience, have become more moderate and effective than those popularly elected when it comes to diligence, fairness, impartiality and respect for the process.
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> 31. Federal judges, all of whom are appointed for life, are generally perceived as being more qualified and capable, and more impartial, evenhanded and independent than State Court judges. This perception appears to be based on the difference in the process for their selection, and related difference in politicization of the system, as well as a greater emphasis and concern in the Federal judicial system about actual and perceived impartiality and independence.

Defense Trial Counsel Report, at 19-21. The report concludes "[a]lthough not an absolute, appointed judges, even those with less trial experience, tend to become more effective and moderate judges than those elected, when it comes to diligence, fairness, impartiality and respect for the process….The preferred system of State Court judicial selection is a commission-based appointive process, so-called "merit selection", system." Defense Trial Counsel Report at 40.

A recent study, Is the 'Missouri Plan' Good for Missouri? The Economics of Judicial Selection, concludes that a system of appointment followed by retention election, concludes

> The data show that states using Missouri's current system, on average, rank significantly higher than states using partisan elections, nonpartisan elections, and gubernatorial appointment with council approval alone. We also find no other method of selection resulting in average scores or rankings that are statistically higher than Missouri's current system. Based

> on our analysis, Missouri's current system is far superior to several of the alternatives.[17]

It appears there is ample support for the appointment of judges. Surveys suggest lawyers, regardless of which side they are on, favor merit based selection. It appears that conservative groups like ATRA, and liberal groups like the Brennan Center, agree that a system of merit based selection is preferable to the partisan election of judges. There is also substantial agreement that partisan elections are part of decreasing the public's confidence in the judiciary. Nonetheless, there have been no changes in West Virginia law. How we select our judges, therefore, is an issue worth collegial discussion.

On Judicial Review

In May 2008, the Supreme Court of Appeals declined petitions for appeal in 5-0 votes, from large verdicts, including punitive damages, of $404,335,138[18] and over $220 million dollars,[19] despite precedent requiring appellate review is required in cases involving punitive damages under *Pacific Mutual Life Ins. Co. v. Haslip*,-- U.S. --, 111

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[17] Joshua C. Hall & Russell Sobel, Is the 'Missouri Plan' Good for Missouri? The Economics of Judicial Selection, Show Me Institute Policy Study, No. 15, May 21, 2008, available online at www.showmeinstitute.org/docLib/20080515_smi_study_15.pdf.

[18] The Calendar on the Court's website states:

> **Estate of Garrison G. Tawney, by Lela Ann Goff, Executrix, Lela Ann Goff and Vernon B. Goff, husband and wife, Janice E. Cooper and Clifford R. Cooper, husband and wife, Larry G. Parker, John W. Parker, Orton A. Jones, Ancillary Administrator of the Estate of Richard L. Ashley, and Orton A. Jones, Administrator of the Estate of Alice Myrtle Ashley Jones v. Columbia Natural Resources, LLC, a Delaware corporation, f/k/a Columbia Natural Resources, Inc., a Texas corporation; NiSource Inc., a Delaware corporation; Columbia Energy Group, a Delaware corporation; and Chesapeake Appalachia, L.L.C., an Oklahoma Limited Liability Company - No. 080482.** Defendants appeal following an adverse jury verdict totaling $404,335,138 in this action arising out of ceratin oil and gas leases. Defendants raise a variety of errors, including violations of their due process rights and issues related to class certification, jurisdiction, evidentiary rulings, and instructional error, among others. **Refuse 5-0 [Kirkpatrick, Judge and O'Hanlon, Judge By Temporary Assignment] [Davis, J. Disqualified] [Benjamin, J. Disqualified]** www.state.wv.us/wvsca/calendar/may22_08r.htm.

[19] The Calendar on the Court's website states:

> **Wheeling Pittsburgh Steel Corporation and Mountain State Carbon, LLC v. Central West Virginia Energy Company and Massey Energy Company - No. 080183.** Defendant Central West Virginia Energy Company appeals after an adverse jury verdict and the circuit court's denial of motions in a case where plaintiffs Wheeling Pittsburgh Steel Corporation and Mountain State Carbon, LLC, allege breach of contract and fraud. Co-defendant Massey Energy Company has filed a separate appeal, No. 080182. - **Refuse 5-0 [Jolliffe, Senior Status Judge By Temporary Assignment] [Maynard, C.J. Disqualified]** www.state.wv.us/wvsca/calendar/may22_08r.htm.

S.Ct. 1032, 113 L.Ed.2d 1 (1991)(requiring "a meaningful and adequate review [of punitive damage awards] by the appellate court.")[20]

The availability of judicial review is significant to all parties, regardless of whether the action is civil or criminal, or which side you are on. Review only at the petition stage, particularly of important issues, is simply not acceptable, and provides no way of assessing, in a public way, the fairness of verdicts or judgments. Opinions, reached after adversary research, achieve this important goal. One solution to this problem is the establishment of a mid level appeals court, which would provide the regular and mandatory appellate review sometimes lacking in our singular Supreme Court of Appeals.

It appears there is fairly strong support in West Virginia for the formation of an intermediate appellate court. In 2005, Senate Bill 583, amended several provision of the Code relating to family courts, including West Virginia Code §51-2A-16. Subsection (c) states

> (c) Prior to the two thousand eight regular session of the Legislature and annually thereafter, the Supreme Court of Appeals shall report to the Joint Committee on Government and Finance the number of appeals from final orders of the family court filed in the various circuit courts and in the Supreme Court of Appeals, the number of pro se appeals filed, the subject matter of the appeals, the time periods in which appeals are concluded, the number of cases remanded upon appeal and such other detailed information so as *to enable the Legislature to study the appellate procedures for family court matters and to consider the possible necessity and feasibility of creating an intermediate appellate court or other system of appellate procedure.* (italics added).

Both Steve Roberts, president of the state Chamber of Commerce, and West Virginia Association for Justice President Teresa Toriseva, have reportedly expressed support for at least the concept of a midlevel appeals Court.[21]

In a 2004 survey of members of the West Virginia State Bar, 61% of those who voted supported an intermediate appellate court. In 1994, 53% were *against* an intermediate appellate court, versus 41% in favor. The 1999 survey showed 56% in favor, and 42% against.[22]

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[20] Following *Haslip,* in *Garnes v. Fleming Landfill Inc*. 186 W.Va. 656, 413 S.E.2d 897 (1991) the West Virginia Court stated: "Under our system for an award and review of punitive damages awards, there must be: (1) a reasonable constraint on jury discretion; (2) a meaningful and adequate review by the trial court using well-established principles; and (3) a meaningful and adequate appellate review, which may occur when an application is made for an appeal."

[21] "Appeals refusals may reveal gap in judicial system," Charleston Gazette, June 2, 2008, at 1A.

[22] www.wvbar.org/barinfo/99survey/comparison.htm.

Indeed, this was a recommendation of the Access to Justice Committee of the 1997 Commission on the Future of the Judiciary. The Commission recommended "The Legislature should create an Intermediate Court of Appeals as soon as possible…." Recommended parameters included a single, statewide appellate court, capable of being split into panels. Intermediate appellate judges would serve eight year staggered terms, and be selected in the same manner as Supreme Court justices. The court would have jurisdiction over all administrative agencies including workers compensation. Criminal and civil appeals would be filed in the Supreme Court, which would retain its original jurisdiction, and decide which to send to the intermediate appellate court. Importantly, [e]ach litigant should be guaranteed one appeal-of-right either at the Intermediate Court of Appeals or at the Supreme Court." Opinions would be issued in each case.

The Defense Trial Counsel of West Virginia recommended the establishment of an intermediate appellate court in its 1997 Civil Justice Report, although some members surveyed expressed concern about its efficacy if its judges were elected in partisan elections. Defense Trial Counsel Report, at 29, 54, 97.

The lack of a right to appellate review has been criticized. In the 2007 "Judicial Hellholes" report from the American Tort Reform Association (ATRA), which states "West Virginia …. is almost unique among the states in providing civil defendants with no assurance that they will receive appellate review, and, as one of the cases highlighted in this year's report shows, this can leave a business hit with a multimillion-dollar verdict with nowhere to turn." Criticisms of the lack of appellate review include discretionary review, the lack of an intermediate appellate court, and, more in particularly, refusal to examine punitive damages awards.

An intermediate appellate court is a solution to this issue, which provides meaningful appellate review to all litigants, civil and criminal. The devil, of course, is in the details of how to select the members of the court, the number of members, whether to have alternating panels, etc. Since there is support for the concept, these details can and should be worked out.

On the Attorney Client Privilege

The privilege is the backbone of the relationship between attorney and client. Without it, and the promise of confidentiality, clients cannot be candid with counsel. The privilege is under attack. Most significant are the so-called Thompson and McNulty memoranda, under which the Department of Justice conditioned plea bargaining on the waiver of attorney client privilege, and the agreement of corporations to withdraw funding of counsel for their employees.

Responding to the aggressive stance taken by the administration, on February 28, 2008, the Senate passed Senate Bill 2450, which is designed to protect the attorney client

privilege, by amending Rule 502 of the Federal Rules of Evidence.[23] A disclosure of privileged communications acts as a waiver of undisclosed communications if intentional, the disclosed and undisclosed communications or information concern the same subject matter; and they ought in fairness to be considered together. New Rule 502 also protects against inadvertent waiver, stating waiver will not occur when ''(1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)." The Rule limits use in Federal court of waivers which occur in state proceedings. The full text of the bill can be viewed at http://www.uscourts.gov/rules/S2450.pdf. The Bill has passed the Senate and, as of May 3, 2008, according to Gov.track, "[t]his bill has been passed in the Senate. The bill now goes on to be voted on in the House. Keep in mind that debate may be taking place on a companion bill in the House, rather than on this particular bill."

In civil cases, lawyers often aggressively pursue discovery of privileged information. Rule 26(b)(1) of the West Virginia Rules of Civil Procedure provides parties "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action…." The stance taken in criminal cases, as exhibited by the Thompson and McNulty memoranda, and the need for reform of Rule 402 is a reminder to all of the importance of the privilege, the need to protect it, and the obligation to respect the privilege.[24]

On Judicial Disqualification[25]

On May 13, 2008, the Washington Post reported that the United States Supreme Court "could not raise a quorum to consider review of a wide-ranging class-action lawsuit that accuses more than 50 U.S. businesses of helping South Africa's former apartheid regime," because only five of nine justices could hear the case. Four justices recused themselves because of investment holdings in one of the corporations that was a party. This left the Court short of the six required votes and the case was therefore remanded.[26]

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[23] www.govtrack.us/congress/bill.xpd?bill=s110-2450#votes. The Bill was heavily supported by legal groups, including the ABA., http://www.abanet.org/poladv/letters/attyclient/, Lawyers for Civil Justice, http://www.lfcj.com/process.cfm?pageID=1&fullStory=100,

[24] For a great blog on the Attorney Client Privilege, see http://wordpress.com/tag/attorney-client-privilege/.

[25] This section of the paper is derived, in large part, from a speech and paper entitled "Judicial Disqualification and Other Impossible Positions for Defense Lawyers," I presented at the Association of Defense Trial Attorneys' (ADTA) Annual Meeting in San Diego, CA, on April 19, 2007.

[26] www.washingtonpost.com/wp-dyn/content/article/2008/05/12/AR2008051200935.html.

Recusal is required to ensure litigants of a judge who is fair, and has no bias or prejudice.[27] "A fair trial in a fair tribunal is a basic requirement of due process."[28] This principle was well stated by the Supreme Court of Appeals of West Virginia in *State ex rel. Skinner v. Dostert*, 278 S.E.2d 624 (W. Va. 1981): "In our adversarial system of jurisprudence, the judge is not a party, he is the referee. The judge is as an official of an athletic event . . . The referee or umpire must not become an adversarial participant in the scenario for if he does, he brings discredit to the integrity of the system. For a judge to participate as an adversary denies to the people one fundamental element of due process: the right to an unbiased tribunal."

Rule 3B(1) of the ABA Model Code of Judicial Conduct states "a judge shall hear and decide matters assigned to the judge except those in which disqualification is required." Disqualification, therefore, is the exception and not the rule. "Disqualification can work a substantial hardship on the parties, other judges, and the judicial system. In addition, if judges are too quick to disqualify themselves, parties can shop for judges."[29]

Issues of disqualification have become more of an issue as some judges (particularly those running for election) push the limits of their first amendment right to free speech under *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).[30] To the extent this occurs, clients may be faced with the prospect of appearing before a judge who has made public statements, in the course of a campaign, or elsewhere, which suggest bias.

Various rules touch upon this situation, which requires a balance between the duty of counsel to zealously the client's right to a neutral judge, and appropriate respect for the judiciary. Each state has its own Rules, many modeled in whole or in part on American Bar Association model rules, and the federal courts have their own rule.

Rules Related to Judicial Disqualification

Judicial disqualification rules evolved from the common law maxim that a man may not be a judge in his own case, and early rules focused largely on the issue of self interest.[31] On the front end, the Rules place responsibility on lawyers to show

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[27] United States v. Wade, 931 F.2d 300, 304 (5th Cir. 1990), cert. denied, 502 U.S. 888, 112 S. Ct. 427, 116 L.Ed.2d 202 (1991).

[28] *Tumey v. Ohio*, 273 U.S. 510, 532[, 47 S. Ct. 437, 444, 71 L. Ed. 749, 758 (1927).

[29] Robert F. Cochran and Teresa S. Collett, Cases and Materials on The Rules of the Legal Profession 322 (1996).

[30] I don't know about the rest of you, but every time I write a paper, I run across something that itself requires a paper. The parameters of propriety under *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) is exactly such a topic, which I won't tackle here. For those wanting more, take a look at Eileen Gallagher, Judicial Ethics and the First Amendment, published in the ABA Journal, and available online at www.abanet.org/jd/publications/jjournal/2003spring/gallagher.pdf. The lawyer who won *White* has made a career of expanding the law to allow judges to state their personal beliefs in campaigns, such as being pro-life, as long as they do not bind themselves to particular decisions. "The Big Bopper," ABA Journal 31 (Nov. 2006).

[31] See, Don R. Sensabaugh, Judicial Ethics – Recusal of Judges -- The Need for Reform, 77 West Virginia Law Review 763 ().

appropriate respect for the judiciary. Model Rule 3.5 prohibits lawyers from seeking to influence judges, jurors or other officials by means prohibited by law.[32] The comment to this Rule restricts lawyers from abusive or "obstreperous" conduct, and states: "A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default in no justification for similar dereliction by an advocate."[33] Model Rule 8.2 states a lawyer "shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge…or candidate for election or appointment to judicial or legal office."[34] Rule 8.3, "Reporting Professional Misconduct," states "[a] lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority."[35]

All states have Codes of Judicial Conduct, which, to varying degrees, are modeled after the ABA Code. In West Virginia[36], the canons provide "[a] justice shall disqualify himself or herself, upon proper motion or sua sponte, in accordance with the provisions of Canon 3(E)(1) of the Code of Judicial Conduct . . . ." Rule 29(b), W. Va. R. App. P. "A judge shall disqualify himself of herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party . . . ." Canon 3(E)(1)(a), W. Va. Code Jud. Conduct. Other states have similar codes, modeled upon the ABA standards. In Ohio, Canon 3(B)(8) of the Code of Judicial Conduct requires judges to perform the duties of Judicial Office "impartially and diligently."

The American Bar Association Joint Commission to Evaluate the Model Code of Judicial Conduct issued a report in December, 2006, recommending changes to the ABA Model Code of Judicial Conduct:

> RULE 2.11 Disqualification
>
> (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:
>
> > (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of facts that are in dispute in the proceeding.
> >
> > (2) The judge knows* that the judge, the judge's spouse or domestic partner,* or a person within the third degree of relationship* to either of them, or the spouse or domestic partner of such a person is:

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[32] Model Rules of Professional Conduct, American Bar Association, 2006 Edition at 82.
[33] Id. at 83.
[34] Id. at 124.
[35] Id.

(a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

(b) acting as a lawyer in the proceeding;

(c) a person who has more than a de minimis* interest that could be substantially affected by the proceeding; or

(d) likely to be a material witness in the proceeding.

(3) The judge knows that he or she, individually or as a fiduciary,* or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household,* has an economic interest* in the subject matter in controversy or is a party to the proceeding.

(4) The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate* contributions* to the judge's campaign in an amount that is greater than $[insert amount] for an individual or $[insert amount] for an entity [is reasonable and appropriate for an individual or an entity].

(5) The judge, while a judge or a judicial candidate,* has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(6) The judge:

(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

(c) was a material witness concerning the matter; or

(d) previously presided as a judge over the matter in another court.

(B) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the

personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household.

(C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

Federal Judges are governed by the Code of Judicial Conduct for United States Judges,[37] which states "[a] judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings."[38] Judges must also avoid taking public positions. Rule 3(A)(6) states "A judge should avoid public comment on the merits of a pending or impending action, requiring similar restraint by court personnel subject to the judge's direction and control. This proscription does not extend to public statements made in the course of the judge's official duties, to the explanation of court procedures, or to a scholarly presentation made for purposes of legal education." Id. As to disqualification, the Code largely tracks the ABA rule.

Federal judges have an affirmative duty of recusal where "another, not knowing whether or not the judge is actually impartial, might reasonably question his impartiality on the basis of all the circumstances." 28 U.S.C. § 455(b)(1); *Hathcock v. Navistar Intern. Transp. Corp.*, 53 F.3d 36, 41, (4th Cir. 1995)(quoting *Allen County v. BSP Div. of Envirotech Corp.*, 866 F.2d 661, 679 (4th Cir. 1989)).

Many states have rules specifically applicable to the filing of motions for judicial disqualification. In West Virginia, a motion of a Supreme Court justice may be filed within thirty days after discovering the basis for disqualification. Justices shall disqualify themselves when required under the Code of Judicial Conduct, or "when *sua sponte*, for any other reason the justice deems appropriate."[39] Recusal is left to the individual judge, without further review, and this is true in the United States Supreme Court. As described by one commentator:

> The United States Supreme Court has developed a procedural void in its recusal process for its Justices. This void undermines the credibility of the Court. According to Justice William Rehnquist, Chief Justice of the Supreme Court, the recusal decision is left wholly up to the individual Justice and 'there is no formal procedure for Court review of the [recusal] decision of a Justice in an individual case.' In other words, when any one

[37] Available online at http://www.uscourts.gov/guide/vol2/ch1.html.
[38] Code of Judicial Conduct for United States Judges ("CJC"), Rule 3(A) (2).
[39] W. Va. Rule of Appellate Procedure 29. The West Virginia Supreme Court website lists a "recusal assistant." http://www.state.wv.us/wvsca/justices.htm.

> Justice weighs the perilous issue of whether recusal is proper, there is no review mechanism, no opinion or public reasoning required, no legal accountability, and no mechanism to handle replacement when recusal occurs. These features create fertile ground for inconsistent recusal choices, which are grounded in rationales the public, the parties, and lower courts cannot question or appreciate because they are most often undisclosed. A cloak of secrecy envelops recusal choices.[40]

Often, particularly with trial courts, requests for disqualification are made by letter, allowing the court to be advised of the issue absent a formal motion.

Particular Situations Requiring Judicial Disqualification

As the rules suggest (particularly the proposed ABA rule), the grounds for disqualification range from positions taken, or clients represented, by the judge before going on the bench, to statements made to the media during campaigns (or anytime), to behavior in the courtroom. One example occurred when a judge refused to disqualify himself after the defendant (whom he later sentenced) threw a loudspeaker striking the judge in the face.[41]

The issue of judicial disqualification has been considered by the United States Supreme Court on several occasions. In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860-61 (1988), the Supreme Court stated the standard for recusal is whether a reasonable and objective person who knew all the facts would have doubts about the judge's impartiality. "The goal is to avoid even the appearance of partiality." Id. at 860 (citation omitted).

The Seventh Circuit stated the test for disqualification is "whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done in the case."[42] The Indiana Supreme Court has stated the issue "is not whether the judge personally believes himself or herself to be impartial, but whether a reasonable person aware of all the circumstances would question the judge's impartiality."[43]

There is a general presumption that judges are impartial. The party challenging a judge for bias bears a substantial burden in challenging the partiality of a judge. See, *Bin-Wahad v. Coughlin*, 853 F. Supp. 680, 683 (S.D. N.Y. 1994) ("Judge is presumed impartial and a substantial burden is imposed upon affiant to prove

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[40] Caprice L. Roberts, The Fox Guarding the Henhouse? Recusal and the Procedural Void in the Court of Last Resort, 57 RUTGERS LAW REVIEW 107 (2004).

[41] *State v. Ahearn*, 403 A.2d 696 (Vt. 1979)(Affirming judgment, finding the sentence issued by the judge did not establish bias or prejudice against the defendant after he threw a speaker at the judge). To give credit where due, I came across the *Ahearn* case in Professor Cochran's textbook. Cochran, supra n. 3.

[42] Pepsico, Inc. v. McMillen, 764 F.2d 458, 460 (7th Cir. 1985).

[43] *In the Matter of Wilkins*, 777 N.E.2d 714 (Ind. 2002)(citing In re Morton, 770 N.E.2d 827, 831 (Ind. 2002)).

otherwise"); *In re Larson*, 43 F.3d 410, 414 (8th Cir. 1994; *DelVecchio v. Illinois Dept. of Corrections*, 31 F.3d 1363, 1375 (7th Cir. 1994).[44]

Judges who talk with the media and express opinions risk disqualification. A West Virginia judge made derogatory remarks about a litigant's character during a national television interview and was found to have departed from a neutral role, requiring his disqualification.[45] Where a judge made comments expressing even an ambiguous opinion on a school program receiving media attention, disqualification was required.[46] A judge who appeared on television stating strong "law and order" views had to be disqualified.[47] Expressions of bias against counsel,[48] or confrontations with litigants may be enough for disqualification.[49] In *In re Aguinda*, 241 F.3d 194, 201-02 (2d Cir. 2001), the Second Circuit commented on the relationship of publicity and disqualification: "with regard to the appearance of partiality, the appearance must have an objective basis beyond the fact that claims of partiality have been well publicized. . . . That which is seen is sometimes merely a smokescreen. Judicial inquiry may not therefore be defined by what appears in the press. If such were the case, those litigants fortunate enough to have easy access to the media could make charges against a judge's impartiality that would effectively veto the assignment of judges. Judge-shopping would then become an additional and potent tactical weapon in the skilled practitioner's arsenal.

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[44] Some courts suggest the parties are not required to investigate the basis for disqualification of a judge. *Tennant*, 194 W. Va. at 108-109. "Such investigation, of course, would undermine public confidence in the judiciary and hinder, if not disrupt, the judicial process--all to the detriment of the fair administration of justice." *Porter v. Singletary*, 49 F.3d 1483, 1489 (11th Cir. 1995). Instead, litigants and counsel should be able to rely upon judges to comply with the Canons of Ethics.

[45] *Judith R. v. Hey*, 185 W. Va. 117, 123, 405 S.E.2d 447, 454 (1990)(under the precursor to Canon 3(A)(9), a circuit court judge departed from his neutral role by criticizing a party's character on the public airways and therefore would be disqualified on remand). The judge in the case was disciplined over the comments. *In the Matter of Hey*, 188 W.Va. 545, 425 S.E.2d 221 (1992). Cases cited by the court about public statements include *Shapley v. Texas Dept. of Human Resources*, 581 S.W.2d 250, 253 (Tex.Civ.App.1979) (judge told press it was his opinion a child in a proceeding before him had been tortured); *Matter of Sheffield*, 465 So.2d 350 (Ala.1984) (judge made specific comments on the merits of pending case to newspaper editor); *State ex rel. Commission on Judicial Qualifications v. Rome*, 229 Kan. 195, 623 P.2d 1307, cert denied, 454 U.S. 830, 102 S.Ct. 127, 70 L.Ed.2d 108 (1981) (judge's delivered memorandum to media). Compare, *Scott v. Flowers*, 910 F.2d 201 (5th Cir.1990) (reprimand violated judge's first amendment right to make truthful public statement critical of the administration of the county judicial system).

[46] *In re: Boston's Children First*, 244 F.3d 164, 170 (1st Cir. 2001)(finding a judge disqualified where she had made statements to the media about a pending case involving a school assignment program, a prominent local issue, and the arguable ambiguity of those statements created an appearance of impropriety)..

[47] *United States v. Cooley*, 1 F.3d 985, 995 (10th Cir. 1993). For more research leads on the disqualification issue, see, Disqualification of Judge for Bias Against Counsel for the Litigant, 54 A.L.R.5th 575.

[48] See, Disqualification of Judge for Bias Against Counsel for the Litigant, 54 A.L.R.5th 575.

[49] *State v. Ahearn*, 403 A.2d 696 (Vt. 1979)(litigant threw speaker at judge); *In re Browning*, 197 W.Va. 75, 475 S.E.2d 75 (1996)(magistrate's confrontation with litigant about litigant's testimony against him in prior proceeding required recusal); *In re Troisi*, 504 S.E.2d 625 (W.Va. 1996)(judge sanctioned for confronting criminal defendant in court, and biting him on nose).

The test, as we have stated, is one of reasonableness, and the appearance of partiality portrayed in the media may be, at times, unreasonable."[50]

A judge being considered for another position, particularly if it is related to the action before the court, or controlled by a party to an action, may have an obligation of disqualification.[51] A magistrate correctly declined to issue a criminal summons sought by a state environmental investigator against a company building a bridge. She told him "she fought for the construction of the bridge as it provided her with her only means of access to her house during periods of high water. [Therefore] she could not handle the complaint due to prejudice and, therefore, he should see another magistrate."[52]

Prior adverse rulings are generally not the basis for disqualification. *Davis v. Liberty Mutual Insurance Company*, 38 S.W. 3d 560 (Tenn. 2001)(judges prior ruling against party or witness not grounds for recusal); *United States v. Cooley*, 1 F.3d 985 (10th Cir. 1993)(prior adverse rulings not ordinarily enough to require disqualification.) *In Re: D.C.*, 49 S.W. 3d 694 (Mo. Ct. App. E.D. 2001) (ruling against a party will not serve as grounds for judicial recusal). *Clay v. State*, 829 So. 2d 676 (Miss. Ct. App. 2002)(Parties' irritation at trial judge's adverse ruling not grounds to force the judge to recuse himself); *Jones v. State*, 841 So.2d 115 (Miss. 2003) (denial of motion to disqualify prosecutor not basis for accusation of bias; recusal not required).

Disqualification can result where there is an antagonistic relationship between counsel and the court. An Indiana case which started with a sanction against counsel for sharply criticizing an appellate court in a brief provides a fascinating case study. *In the Matter of Michael A. Wilkins,*[53] is a disciplinary opinion arising from sanctions imposed on counsel who stated, in a footnote in a brief to the Indiana Supreme Court, that the lower court's "[o]pinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision)." The Supreme Court denied the petition in question, and ordered the brief stricken as a "scurrilous and intemperate attack on the integrity of the Court of Appeals...."[54], stating "[w]e find that his comments….violated [the Rules of Professional Conduct] because they were made with reckless disregard as to the truth or falsity concerning the integrity of a three-judge panel of the Court of Appeals." The Court in a 3-2 vote sanctioned the attorney by suspending his license for thirty days.[55]

The attorney filed a motion to reconsider, and to recuse Justice Rucker, who concurred in the disciplinary opinion, because he previously sat on the Appeals court

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[50] I was pointed to this case by footnote 2 in the *In the Matter of Wilkins* opinion.

[51] See, Ronald D. Rotunda, The Propriety of A Judge's Failure To Recuse When Being Considered For Another Position, 19 Geo. J. Legal Ethics 1187 (2006).

[52] In the Matter of Browning, 192 W.Va. 231; 452 S.E.2d 34 (1994).

[53] 777 N.E.2d 714 (Ind. 2002).

[54] Michigan Mutual Insurance Company v. Sports, Inc., 706 N.E.2d 555 (Ind. 1999).

[55] As a matter of comment, I include the discussion of this case as an illustration of what can happen in a case where counsel and the court (whatever court) become antagonistic. While I wouldn't have written the brief the way this lawyer did, I think a sanction for making an argument that the lower court was result oriented and did not follow the law simply collides with the duty of counsel to zealously advocate.

panel whose decision was the subject of the lawyers' criticism. The attorney argued the Justice should have disqualified himself *sua sponte* from hearing the disciplinary matter. While pointing out he was not aware he served on the panel (having been on the Appeals Court for fourteen years), and noting the motion was not made until after the disciplinary opinion issued, Justice Rucker recused himself, stating he had a responsibility to promote public confidence in the system.[56]

Family or business relationships with litigants, the variations of which are legion, may also mandate recusal.[57] However, recusal is difficult to obtain. Justice Scalia declined to recuse himself when challenged for attending a duck hunting trip with Vice President Chaney, a party to an action pending before the court,[58] or when he made public remarks about the establishment clause.[59]

The "doctrine of necessity" may allow a judge otherwise disqualified to act if his disqualification would effectively eliminate the tribunal. "The majority view is that the rule of disqualification must yield to the demands of necessity, and a judge or an officer exercising judicial functions may act in a proceeding wherein he is disqualified by interest, relationship, or the like, if his jurisdiction is exclusive and there is no legal provision for calling in a substitute, so that his refusal to act would destroy the only tribunal in which relief could be had and thus prevent a determination of the proceeding."[60]

Recusal rules have also the subject of direct challenge, where litigants assert the absence of review of a judge's refusal to disqualify violates due process rights. In *Feiger*

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[56] *In the Matter of Michael A. Wilkins,* Cause No.: 49S00-0005-DI-341 (Jan. 3, 2003)(available online at http://www.in.gov/judiciary/opinions/archive/01030301.rdr.html). Justice Rucker's opinion is worth reading for its careful discussion of the law. Whether a judge believes he can be impartial is not the question; the issue is whether a "reasonable person aware of all the circumstances" would question the impartiality of the judge. Id., (citing *Morton*, 770 N.E.2d at 831). A reasonable person is "the proverbial average person on the street with knowledge of all the facts and circumstances alleged in the motion to recuse . . . ." *In re Martin-Trigona*, 573 F. Supp. 1237, 1243 (D. Conn. 1983). See also, *United States v. Jordan*, 49 F.3d 152, 157 (5th Cir. 1995); *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990) (observing that a lay observer would be less inclined to credit a judge's impartiality than other members of the judiciary). "[D]isqualification of a judge is mandated whenever a significant minority of the lay community could reasonably question the court's impartiality." *Pennsylvania v. Druce*, 796 A.2d 321, 327 (Pa. Super. Ct. 2002), appeal granted in part, 809 A.2d 243 (Pa. 2002). After the recusal, the Court granted rehearing, and affirmed the sanction, but reduced it to a public reprimand *In the Matter of Michael A. Wilkins,* Cause No.: 49S00-0005-DI-341 (Feb. 4, 2003)(available at http://www.in.gov/judiciary/opinions/archive/02040301.bed.html).

[57] For example, the United States Court of Appeals for the Fourth Circuit requires litigants to file corporate affiliate/financial interest disclosure statements. See, Rule 26.1, Fourth Circuit Local Rules (1998). A fairly recent examples of a motion based on relationships was one based on

[58] See, Roberts, supra, at 115. Justice Scalia authored a memorandum explaining his reasons. *Cheney v. United States Dist. Ct.*, 124 S. Ct. 1391, 1393-94 (2004) (Scalia J.) (memo).

[59] See, Roberts, supra, at 122. The motion was made in *Elk Grove Unified School. Dist. v. Newdow*, 124 S. Ct. 2301, 2304 (2004), based on comments Justice Scalia made in a speech.

[60] *State ex rel Brown v. Dietrick*, 191 W.Va. 169, 444 S.E.2d 47 (1992) (quoting 46 Am. Jur. 2d Judges § 89 (1969), and citing *Olson v. Cory*, ___ Cal. 3d ___, 178 Cal. Rptr. 568, 636 P.2d 532 (1980); Eismann v. Miller, 101 Idaho 692, 619 P.2d 1145 (1980); *Schwab v. Ariyoshi*, 57 Haw. 348, 555 P.2d 1329 (1976)).

v. Ferry, Slip Op. No. 05-1295 (6th Cir. Dec. 26, 2006), the United States Court of Appeals for the Sixth Circuit was faced with an attorney's challenge to the constitutionality of the Michigan recusal rule.

Michigan Court Rule, 2.003, allowed a party to raise the issue of a judge's disqualification by motion when the judge cannot "impartially hear a case," for reasons specified, including "the judge is personally biased or prejudiced for or against a party or attorney." The procedure set forth in the rule allowed the challenged judge to decide the motion. If the challenged judge denied the motion, in any court having two or more judges, at the request of a party, the chief judge had to re-decide the motion *de novo.* In single judge courts, or if the challenged judge was the chief judge, the motion had to be referred to the state court administrator for assignment to another judge who should decide the motion *de novo*.

The plaintiff was "an outspoken critic of the Michigan Supreme Court …," and "several of the justices made public remarks about [him]." Feiger unsuccessfully sought recusal of four justices in two appeals pending before the Michigan Supreme Court.[61] He sued in federal court seeking declaratory judgment that his constitutional rights had been violated, that the Michigan Court's interpretation of its recusal rule was unconstitutional. He alleged the court failed to follow the procedures set forth in MCR 2.003(c)(3), and sought a declaration that the rule either permits the state court administrator to assign a judge of another court to hear and decide a motion to recuse a supreme court justice, or, in the alternative, is unconstitutional. The district court dismissed the action for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine.[62]

The court in *Feiger v. Ferry* decided several issues. First, the Court found that Feiger, a lawyer with present and future cases before the Michigan Supreme Court, had standing to pursue the claim for declaratory relief. Second, the court refused to review the Michigan Justices' past recusal decisions under the *Rooker-Feldman* doctrine.

As to the constitutional challenge, the court found it was not barred by the *Rooker-Feldman* doctrine. "To that extent, the source of Feiger's alleged injury is not the past state court judgments; it is the purported unconstitutionality of Michigan's recusal rule as applied in future cases. Such a claim is independent of the past state court judgments. Thus, insofar as the district court dismissed Feiger's challenge to the constitutionality of Michigan's recusal rule pursuant to the *Rooker-Feldman* doctrine, the court's judgment must be reversed." Reportedly, Attorney Feiger intends to vigorously

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[61] The cases as reported in the Sixth Circuit opinion are *Gilbert v. ____ Chrysler Corporation*, 669 N.W.2d 265 (Mich. 2003), and *Graves v. Warner Brothers*, 669 N.W.2d 552 (Mich. 2003).

[62] For you ADTA brothers and sisters who avoid subject matter jurisdiction issues like the plague, the Reader's Digest version of the *Rooker-Feldman* doctrine basically says that a federal district court may not review a state court decision for federal error. See, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

pursue the case, stating that he will seek to take the depositions of each Supreme Court justice.[63]

Two other cases (cited by the *Feiger v. Ferry* court), affirmed the dismissal of federal actions making constitutional challenges to the state recusal rules. *Howell v. Supreme Court of Texas*, 885 F.2d 308 (5th Cir. 1989), and *Chafin v. West Virginia Supreme Court of Appeals*, 1998 WL 1297605 (S.D. W.Va. 1998), affirmed, 203 F.3d 819 (4th Cir. 1999). In both cases, the district courts found the plaintiffs' constitutional claims were inextricably intertwined with the state court judgment related to the recusal of judges.

With the increased protection for political speech by judges, questions of bias are likely to become more prevalent. In situations where recusal or disqualification is merited due to demonstrable bias by a judge, a motion to recuse is probably the only practical remedy available short of filing litigation, a la *Feiger*, to challenge the constitutionality of the recusal rules. As the cases cited above demonstrate, the basis for recusal must be firmly established in the record. Mere suggestions of bias, without more, will not be enough (and should not be enough) to accomplish recusal.

The issue of the lack of review of a recusal decision by a single judge is also an issue that bears discussion. As observed by Professor Roberts, "These features create fertile ground for inconsistent recusal choices, which are grounded in rationales the public, the parties, and lower courts cannot question or appreciate because they are most often undisclosed. A cloak of secrecy envelops recusal choices."[64] The Brennan Center Report, Setting Fair Recusal Standards, relates much of the problem to partisan judicial elections and suggests strengthening recusal rules with peremptory disqualification, available in some states; enhanced disclosures by judges; per se rules on campaign contributions; independent adjudication of recusal motions; a requirement of explanation in a decision on a motion for recusal; and established mechanisms for replacing recused judges are a few. There is also a suggestion for independent recusal bodies.

The issue of recusal, and how to fairly handle it to ensure fair tribunals is an important issue for lawyers and judges. Establishing procedures for recusal that are systematic, transparent and fair is a reasonable goal.

Final Thoughts

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[63] "Feisty Feiger Carries on his Fight," ABA Journal E-Report, January 12, 2007. The Journal references a disciplinary decision, *Grievance Administrator v. Feiger,* No. 127547 (July 31, 2006), in which Fieger, a malpractice verdict was reversed stated on his radio program that he was declaring war on justices of the court and that they could "kiss my ass." He also referred to them as jackasses and made other derogatory remarks, comparing them to Hitler, Goebbels and Eva Braun. The decision is available the Michigan Supreme Court website, www.courts.michigan.gov//supremecourt and is an interesting read. A four justice majority concluded the remarks violated Michigan disciplinary rules and voted to reverse the disciplinary board (which concluded the rules were unconstitutional) and remand the case for entry of a reprimand. The majority, and reversed an order of the Attorney Disciplinary Board that. The vigorous dissenting opinions, and response by the majority, suggest a political rift on the court.

[64] Caprice L. Roberts, The Fox Guarding the Henhouse? Recusal and the Procedural Void in the Court of Last Resort, 57 RUTGERS LAW REVIEW 107 (2004).

It is difficult to come to agreement how to solve some of the issues related to judicial selection, appellate review, the challenges to the attorney client privilege and the issue of recusal. For example, there are passionate and valid arguments both for and against election and selection, as to which produces "better" judges or which promotes a higher degree of confidence in the process and in the judiciary. Some arguments are partisan, some more in principal. Nonetheless, all are issue which can and should be discussed and debated in a collegial manner. Lawyers strive for solutions for their clients on a daily basis, and these issues are no harder nor are they much different.

I thank the West Virginia Association for Justice for the opportunity to present this paper and participate in their annual meeting.

A 2004 resolution of the State Bar Board of Governors called upon both candidates for the Supreme Court of Appeals to comply with the Rules of Professional Conduct and Code of Judicial Conduct.[65]

[65] www.wvbar.org/barinfo/members/bog%202004/resolution.pdf.